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Supreme Court of the United States

OCTOBER TERM [redacted] 1963

No. 219

ISABEL CARMEN SAURI TYRELL, ET AL.,
PETITIONERS,

v.

MERCEDES BERDECIA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Now come the petitioners and through their undersigned counsel respectfully pray this Honorable Court to issue a Writ of Certiorari to review the judgment rendered by the Supreme Court of Puerto Rico reversing the order entered by the Superior Court of Puerto Rico, Ponce Part, which granted the motion for the cancellation of a notice of *lis pendens* and ordered the Registrar of Property of Puerto Rico, Ponce District, to cancel said notice, all in connection with properties belonging to the estate of Rafael Sauri Tristani, who died under a valid testament or will.

The validity of said will is not questioned or in issue in this case.

(a) Opinion and Orders of Courts Below

A copy of the official translation into English of the opinion of the Supreme Court of Puerto Rico, and of the order of the Superior Court of Puerto Rico, Ponce Part, are attached hereto as Appendices "A" and "B". (Record, pp. 5-17 and 68-83.)

(b) Jurisdiction of this Court

The judgment sought to be reviewed was rendered and filed on January 25, 1963, and reconsideration was denied on February 26, 1963. The jurisdiction of this Court is invoked under Pub. L. 87-189, Sec. 1, Aug. 30, 1961, 75 Stat. 417, 28 U.S.C.A. 1258, and 62 Stat. 961, as amended, 28 U.S.C.A. 2101.

(c) Question Presented for Review

The question presented for review arises from the order issued by the Superior Court of Puerto Rico, Ponce Part, granting a motion for the cancellation of a notice of *lis pendens* recorded in the Registry of Property of Puerto Rico, Ponce District, in connection with properties belonging to petitioners by inheritance in the estate of the deceased testator, Rafael Sauri Tristani. Said testator died in Ponce, Puerto Rico, on January 25, 1952, under a testament or will, whose validity is not questioned herein, and in which he designated as his legitimate testamentary succession his only legitimate child Isabel Carmen Sauri Tyrell, his only legitimate grandchildren Isabel Marie and

Eugene Lois Nicole Sauri, and his surviving spouse, Elizabeth Tyrell Howard.

This order for the cancellation of the notice of *lis pendens* was adverse to respondent, who, in a *post mortem* action, was claiming inheritance rights and a share in the properties and estate left by Rafael Sauri Tristani as well as filiation rights against said estate. Her alleged illegitimate natural father, Felix Rafael Sauri Tyrell, had died *abintestato* in Ponce, Puerto Rico, on December 3, 1938, leaving no estate or property at his death. Respondent was born on September 3, 1928, in Ponce, Puerto Rico.

Respondent's allegedly illegitimate natural father was a legitimate son of Rafael Sauri Tristani, the testator.

The order of the Superior Court of Puerto Rico, Ponce Part, granting the motion for the cancellation of the notice of *lis pendens* concluded that even in the event that recognition could be adjudged to said respondent as an illegitimate natural child of said illegitimate natural father, Felix Sauri Tyrell, who was a legitimate son of the testator Rafael Sauri Tristani, and as an illegitimate natural grandchild of said testator, she was not entitled to receive property by inheritance from this testator from his testamentary estate or succession, because according to the statutes in force at the date and time of her birth (1928), she was not considered and did not qualify as a forced heir of the testator, inasmuch as she was an illegitimate grandchild; that not being entitled by law to share in the hereditary estate of said testator, and not being his forced heir according to the statutes governing her filiation rights at the time of her birth (1928), there was no possibility of a decision or judgment in her behalf acknowledging her as a forced heir of her illegitimate natural grandfather in his estate, and permitting her to represent her allegedly illegitimate natural father in such estate pursuant to the laws and statutes in force at the date and time of her birth.

On this ground the Superior Court of Puerto Rico, Ponce Part, rendered its order directing the Registrar of Property of Puerto Rico, Ponce District, to cancel the notice of *lis pendens* recorded by respondent in connection with the properties belonging to the estate of testator Rafael Sauri Tristani, for the reason that it was not possible for her to be an heir of said testator. By this order the Superior Court of Puerto Rico, Ponce Part, returned to petitioners the free and legitimate use of their rights on the properties as owners by title of inheritance.

On January 25, 1963, the Supreme Court of Puerto Rico set aside the order of the trial court and remanded the case to that court for further proceedings.

The question presented in the petition at bar, erroneously decided by the Supreme Court of the Commonwealth of Puerto Rico, setting aside the order entered by the Superior Court of Puerto Rico, Ponce Part, reversing the order granting the motion for cancellation of the *lis pendens*, is an inexplicable adjudication against petitioners' rights without due process of law, of ownership and disposal of the properties. Petitioners are deprived or limited in their ownership rights in connection with the properties which has been encumbered for years because of said *lis pendens*.

Statutes Involved

The Federal and Commonwealth Constitutions and the Statutes of Puerto Rico involved are:

1. Constitution of the United States of America

(a) Fifth Amendment:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

(b) Fourteenth Amendment:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Constitution of the Commonwealth of Puerto Rico, Article II, Section 7:

"... No person shall be deprived of his liberty or property without due process of law. No person in Puerto Rico shall be denied the equal protection of the laws; ..." (1 L.P.R.A. p. 180.)

3. Civil Code of Puerto Rico

"3. Laws shall not have a retroactive effect unless they expressly so decree. In no case shall the retroactive effect of a law operate to the prejudice of rights acquired under previous legislative action." (31 L.P.R.A. § 3.)

"§ 127. A recognized natural child has the right:

"1. To use the surname of the parents making the recognition.

"2. To be supported by the same.

"3. To receive the hereditary portion determined in this code." (Civil Code of Puerto Rico, 1930 ed., 31 L.P.R.A. § 127.)

"All children have, with respect to their parents and to the estate left by the latter, the same rights that correspond to legitimate children." (31 L.P.R.A. § 441; Act No. 17, p. 200, retroactive to June 25, 1952.)

"The rights to the succession of a person are transmitted from the moment of his death." (Civil Code of Puerto Rico, 1930 ed., § 603; 31 L.P.R.A. § 2085.)

"Heirs succeed the deceased in all rights and obligations by the mere fact of his death." (Civil Code of Puerto Rico, 1930 ed., § 610; 31 L.P.R.A. § 2092.)

"Forced heirs are:

"1. Legitimate children and descendants with regard to their legitimate parents and ascendants;

"2. In the absence of the foregoing, the legitimate parents and ascendants, with regard to their legitimate children and descendants;

"3. The widower or widow, the natural children legally acknowledged, and the father or the mother of the latter in the manner and extent established in sections 761, 762, 763, 764, 767, 768, 769, 770, 771, and 772 of this Code." (Civil Code of Puerto Rico, § 736, 1930 ed.)

And as amended by Act No. 447 of May 14, 1947, effective 90 days after its approval, Section 736 of the Civil Code of Puerto Rico, 1930 ed., reads:

"Forced heirs are:

"1. Legitimate children and descendants with regard to their legitimate parents and ascendants, and legally recognized natural children, with regard to their natural or legitimate parents and ascendants.

"2. In the absence of the foregoing, the legitimate parents and ascendants, with regard to their legitimate children and descendants.

"3. The widower or widow in the manner and extent established in sections 2411, 2412, 2413, and 2414 of this title." (Civil Code of Puerto Rico, 1930 ed., § 736, as amended on May 14, 1947; 31 L.P.R.A. § 2362.)

"§ 2434. Transmission of rights of natural children.

"The rights granted natural children by the foregoing sections are transmitted on their death to their legitimate descendants." (Civil Code of

Intestate Succession

The sixth paragraph of § 2661, which amended sec. 902 of the Civil Code of Puerto Rico, 1930 ed., Act No. 448 of May 9, 1950 and Act No. 253 of May 9, 1950, reads as follows:

"A recognized natural child has the right to succeed legitimate children or relatives of the father or mother who has recognized him or her; and they to succeed a recognized natural child." (31 L.P.R.A. sec. 2661.)

Prior to its amendment in 1950 and numbered as paragraph 5, section 902 of the Civil Code of Puerto Rico, 1930 ed., read:

"A recognized natural child has no right to succeed intestate legitimate children or relatives—with the exception of grandparents and other ascendants—of the father or mother who has recognized him or her, nor they to succeed a recognized natural child."

"The rights which all the relatives of a person have to succeed him in all the rights which he would have if alive, of which he might have inherited, is called the right of representation." (Civil Code of Puerto Rico, 1930 ed., sec. 887.)

As amended by Act No. 346 of May 14, 1947, 31 L.P.R.A. sec. 2621, the above section reads:

"The right which all the legitimate or legally-recognized natural relatives of a person have to succeed him in all the rights which he would have if alive, or which he might inherited, is called the right of representation."

Construction with Other Laws

There is no conflict at all between sections 2362 and 2661 of 31 L.P.R.A. Each one contemplates a different situation: the former applies to testamentary succession and the latter to intestate succession. (*Sanchez v. District Court*, 1949, 69 P.R.R. 457.)

And in *Ex-Parte Perez Torres*, 53 P.R.R. 20:

"There is nothing in the Civil Code, as amended by the Legislature, to indicate that the latter intended to change the law which has regulated the rights of natural children to represent their parents, so as to inherit from the legitimate ascendants of those parents, other than as specified in the intestate succession."

And at page 24 of the same case:

"It appeared to the court that the exposition of the act showed that a natural child is a forced heir only of its parents but not of his grandparents. For, as reasoned the court, if the intention of the Legislature had been to make them forced heirs of their grandparents or other ascendants, it would not have used the words 'natural children' but 'natural descendants', or would have added to the words 'natural children' the phrase 'and natural descendants', as the Legisla-

ture did in the first paragraph upon referring to children and legitimate descendants.

Then the court reviewed the jurisprudence of this court and especially the cases of *Velazquez v. De Choudens et al.*, 29 PRR 481; *Ex Parte Smith et al.*, 14 PRR 654; *Ortiz v. Rivera et al.*, 26 PRR 294, and *Correa v. Correa*, 18 PRR 115.

> "One of the conclusions of the court is that in the testate succession, only the forced heirs may not be excluded, and natural children are not forced heirs of their grandparents when there is a will.
>
> "Under these circumstances, the court holds that the case of Velazquez v. De Choudens, supra, is still the law and its reasoning squarely applicable."

In *Marquez v. Aviles*, 252 F.2d 715, 720, the Hon. Calvert Magruder, Chief Justice of the United States Court of Appeals for the First Circuit, states:

> "We mention briefly one point raised by appellants which the Supreme Court of Puerto Rico evidently did not consider of sufficient merit to comment upon. Appellants refer to the provision of § 687 of the Civil Code of Puerto Rico reading: 'In order to determine the qualification of the heir or legatee, the time of the death of the person whose succession is in question shall be taken into consideration.' They then point out that Bonifacio Aviles Perez did not die until 1954. But is quite apparent, from an inspection of the text, especially the second paragraph of § 687, that that section refers only to the preceding § 685, which prescribes the cases in which a person, admittedly an heir, may be disqualified from taking property by in-

heritance. As to the circumstances under which an illegitimate child may by recognition acquire the status of an heir, we have to look to the earlier sections of the Code.

. . . . . .

"Subject, of course, to the power of the legislature to change the rules retroactively, the Supreme Court of Puerto Rico has frequently noted that filiation rights of an illegitimate child are governed by the statutes in force at the date of the birth of such illegitimate child. See Charres v. Arroyo, 16 PRR 777 (1910); Mendez v. Martinez, 21 PRR 238, 252, 256 (1914); Morales v. Heirs of Ceráme, 30 PRR 784 (1922); Mercado v. Heirs of Mangual, 35 PRR 388 (1926); Silva v. Doe, 75 PRR 198, 207 (1953); Sanchez v. Diaz, 78 PRR 771, 776 (1955).

. . . . . .

". . . Thus it is clear that if the inheritance rights of appellants are governed by the statute law in force at the date of their respective births (1928-1940), they are not entitled as heirs to share in the hereditary estate of their father, Bonifacio Aviles Perez."

Statement of the Case

By virtue of a notice of *lis pendens* recorded in the Registry of Property of Puerto Rico, Ponce District, in connection with properties belonging to the estate of Rafael Sauri Tristani, froze for a number of years the right of ownership of petitioners herein, depriving them of the free use of their property as forced legitimate heirs of the testator, Rafael Sauri Tristani. Offers for the posting of bonds to secure respondent's claim in case of a favorable sentence in her behalf were rejected.

This calamitous situation forced petitioners to move the trial court for relief against this unlawful deprivation of their rights, and after an analysis on the merits of petitioners' rights to the free use of their property, and the lack of any color of title to said properties on the part of respondent, the court granted the motion for the cancellation of the notice of *lis pendens*, and directed the Registrar to cancel it.

Respondent filed a petition for certiorari before the Supreme Court of Puerto Rico seeking review of the order granting the cancellation of said *lis pendens*. The Supreme Court reversed the aforesaid order of the trial court directing the Registrar to abstain from cancelling *lis pendens* as ordered by the Ponce Part of the Superior Court.

In arriving to the conclusion that the *lis pendens* ought to be cancelled by law, the Ponce Part of the Superior Court of Puerto Rico passed upon the rights of both parties with regard to the title to said properties. It held, according to the law, to the jurisprudence and opinions of commentators, that since respondent was an illegitimate natural grandchild of the testator, she had no right according to the law and statutes in force at the time of her birth to share as a forced heir in the heriditary estate of her illegitimate natural grandparent, and that if said grandparent had died abintestato (intestate) the law would then have granted her a share in said abintestato.

The provisions of the order of the Ponce Part of the Superior Court of Puerto Rico embody the sound doctrine settled down in our jurisdiction and affirmed by Federal and Puerto Rican decisions regarding this matter.

The reversal of the order of the trial court is repugnant to the universal and established principle of the due process of law, and shall be respected on all judicial proceedings, judgments and orders in cases before our courts where the Constitution of the United States, nation-wide, and our

Commonwealth Constitution, of local application, are the law in our land.

Violation of said principle hinders citizens' rights. The only remedy provided by law in this country against such violations is to resort to the Supreme Court of the United States in order to obtain legally the rights taken away from these petitioners.

Reasons for Granting the Writ

The question posed herein is not new in this jurisdiction. It is and has been for years passed upon by both the Supreme Court of the United States and the Supreme Court of the Commonwealth of Puerto Rico. Shall new substantive laws prejudice the rights acquired under previous legislation? Are the filiation rights of a person determined and granted or not by the laws in force at the time of his birth? Can he or legitimate relatives defend their rights against encroachment allowed by future legislation in favor of illegitimate relatives?

These questions can be answered with only one and definite answer: No. This is evident from the universal principle included in Sec. 3 of the Civil Code of Puerto Rico now in force and at the time respondent was born, to the effect that:

> "Laws shall not have a retroactive effect unless they expressly so decree. In no case shall the retroactive effect of a law operate to the prejudice of rights acquired under previous legislative action."
>
> "Civil statutes of a substantive character, do not have a retroactive effect unless they expressly so provide, and even then, in no case shall they prejudice rights acquired under prior legislation." *Luce & Co.*

v. *Minimum Wage Board*, 1943, 62 PRR 431, affirmed 155 F.2d 983.

"Amendment of substantive law does not make it effective retroactively to the date the amended law originally went into effect unless amendment expressly indicates the contrary and always provided it does not prejudice rights acquired under the earlier legislation. (*Lopez v. South P. R. Sugar Co.*, 1943, 62 PRR 227.) *Rodriguez v. Miller*, 23 PRR 594; *López v. South P. R. Sugar Co.*, 62 PRR 238; *Torres v. Winship*, 56 PRR 694."

There is no common application of the statutes governing testamentary successions and intestate successions (abintestato). They are governed by different rules.

Sections 2362 and 2661, 31 L.P.R.A., on testamentary successions establish a different classification of heirs, with different proposed rights.

Pursuant to Sec. 2434, relative to testamentary successions, the only illegitimate descendants of a grandparent's estate to be considered forced heirs with rights to share in said estate, are those legitimate children descendants of the illegitimate son of the testator, and they are classified as illegitimate descendants of the testator, because although legitimate descendants of the natural sons of grandparents, they became related to said grandparent, they remain illegitimate with regard to him because the only legitimate descendants of grandparents are the legitimate descendants of the legitimate sons of the grandfather testator.

Section 2434 reads: "The rights granted natural children by the foregoing sections are transmitted on their death to their legitimate descendants." Civil Code of Puerto Rico, 1930 ed., Sec. 770, in force during and after the date of respondent's birth.

Section 91 of the Code of Civil Procedure of Puerto Rico, 1933 ed., reads:

> "In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing the answer, when affirmative relief is claimed in such answer or at any time afterwards, may file to record with the Registrar of the district in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the dependency (of the action, and only of its dependency) against parties designated by their real names."
>
> "An expectancy (8 N.Y. 110), e.g., an inchoate right of dower (104 Ill. 403), is not a vested right. There is no vested right in a remedy. 58 Wis. 621; Pa. St. 423; 1 Neb. 419."

Lis pendens is the legal notice to third parties of an action affecting the title or the right of possession of real property, in which the adviser has a vested right of title to it or its possession. And a buyer or encumbrancer by said notice acquires constructive notice of the pendency advised, by which, if adviser succeeds in his claim, the buyer or encumbrancer has to acknowledge the transfer of title or possession to plaintiff in a priority established by the judgment granting plaintiff's claim.

In the case at bar there is not even a possible expectancy for respondent in her claim of hereditary rights and share

on the properties subjected to her *lis pendens* because the law, the statutes, and the decisions exclude her from the status of heir. That is, she is not an heir according to law, being a natural illegitimate grandchild of a natural illegitimate grand-parent, who died under a will or testament. When there is a will, the law and the decisions have repeatedly held that natural illegitimate grandchildren with regard to their natural illegitimate grandparents and other ascendants have the status of collateral relatives in regard to the testator's estate. They can be called legatees, or in the event of the inexistence of forced heirs, they might be called to succession by will but not under an obligation on the part of the testator, because the law and the statutes do not give them the status of forced heirs.

> "Ownership of land is exclusive and does not tolerate a use of the land acquired by another for purposes inconsistent with opposed owner's right, and to irreparably damage the property of the owner is to that extent to deprive him of it and he is protected by the law from any such aggression." *American Railroad Company* v. *Quinones* (1909), 15 PRR 1; 31 L.P.R.A. secs. 1113 and 1114.

The limitation of the right of ownership, although not physically limiting but encumbering without lawful right thereto—tantamount to depriving its owner of the free use thereof.

> "Plaintiff in ordinary suit cannot by mere allegations claim lien and privilege on immovable property or color of title thereto, and compel defendant owner to await determination of litigation, where allegations show as a matter of law that is not entitled to lien or

color of title to property, and defendant owner is entitled to have notice of pendency cancelled." *State ex rel. Ernest Realty Co.* v. *Moore, Reine & Merklein*, 165 So. 147, 183 La. 927; *State ex rel. Metropolitan Land Co.* v. *Recorder of Mortgages*, 117 So. 145, 166 La. 271. (Note, 67 in 54 C.J.S. Sec. 37, p. 606.)

Conclusion

Petitioners respectfully move this Honorable Supreme Court of the United States, to exercise its jurisdiction in the instant petition and decide:

1. That by mere allegations in an ordinary suit respondent cannot claim privileges and rights on immovable properties belonging to an estate from which she is excluded by law.

2. That by the summary denial of the Petition for Review timely filed under the circumstances of this case, respondent would be granted certain rights which she is not granted by law. Such privileges would be against the mandate of law, even considering the retroactive effect of laws on her behalf with the opposition of the enactment of such laws and constitute in this case a violation of the principle of the due process of law, inasmuch as petitioners would be denied review to which they are entitled.

Prayer

WHEREFORE, it is respectfully prayed that the writ of certiorari herein requested be issued and that the judgment of the Supreme Court of the Commonwealth of Puerto Rico in case No. C-62-21 be reversed.

San Juan, Puerto Rico, June 11, 1963.

Respectfully submitted,

(s) CARLOS D. VAZQUEZ
CARLOS D. VAZQUEZ
Counsel for Petitioners
P.O. Box 1658
San Juan, Puerto Rico

I, Carlos D. Vazquez, counsel for the petitioners in this case, DO HEREBY CERTIFY:

That a true and faithful copy of this Petition for Certiorari has been sent by mail to Mr. Hector Lugo Bougal, counsel for Mercedes Berdécia to his known address: P. O. Box 205, Ponce, Puerto Rico.

San Juan, Puerto Rico, June 11, 1963.

(s) CARLOS D. VAZQUEZ
CARLOS D. VAZQUEZ
Counsel for Petitioners

Appendix "A"

(Same Title) (Exhibit II)

ORDER

In August 1952, Mercedes Berdecia brought this action to be declared an acknowledged natural child of Felix Sauri Tyrell and of Dolores Berdecia and to enforce the rights inherent to her condition as such.

Her complaint consists of three causes of action. The first one is an action of filiation, the second cause prays for the annulment of the institution of heirs, and the third one for a declaration of non-existence of contracts.

The first cause of action seeks a declaration to the effect that Mercedes Berdecia is a natural child of Felix Rafael Sauri Tyrell and, hence, his sole heir. The second cause of action seeks the annulment of the will of her natural grandfather, Rafael Felix Eduardo Sauri Tristani, executed by deed No. 1 of January 26, 1949, before Notary Public Carlos E. Colon, on the ground of her preterition therein. The third cause of action challenges the validity of certain transactions engaged in by Rafael Sauri Tristani with respect to these properties on the ground that those transactions were simulated.

In the first cause of action above referred to she alleged that she was born in Ponce on September 3, 1928, and that at that time Felix Sauri Tyrell and Dolores Berdecia were over 18 years of age and unmarried, and that there was no kinship between them and they were able to marry each other without any dispensation.

That her parents had a love affair and lived in concubinage and that she is the fruit of that affair. That plaintiff enjoyed the uninterrupted possession of the status of a natural child of Felix Sauri Tyrell, justified by his spontaneous acts. That Dolores Berdecia urged Felix Sauri Tyrell to acknowledge the child, plaintiff herein, and even filed an action of filiation against him, wherein his

default was entered, but that the action was dismissed for abandonment on January 10, 1944.

That her alleged father died a bachelor on December 3, 1938, leaving no descendants except plaintiff, and being survived by his legitimate parents, Rafael Sauri Tristani and Elizabeth Tyrell Howard. That Rafael Sauri Tristani died on January 25, 1952, under a will he had executed on January 26, 1949, by deed No. 1 of even date before Notary Public Carlos E. Colon, of Ponce. That in said will he instituted as his sole and universal heirs his legitimate child, Isabel Sauri, to whom he left the thirds of the legal and of the extra portions, and his grandchildren, Isabel Marie and Eugene Lois Nicole Sauri, to whom he left the third of free disposal.

By agreement between the parties the case was heard exclusively as to the first cause of action and on May 10, 1959, this Court, by a judgment rendered by the Hon. Judge Ramon Cancio, granted it and consequently held that plaintiff was the acknowledged natural child of Felix Sauri Tyrell.

On May 23, 1961, our Honorable Supreme Court affirmed that judgment. Defendants appealed to the United States Court of Appeals for the First Circuit.

From the beginning of the action and in order to protect her interests, plaintiff recorded a notice of *lis pendens* in the corresponding registry of Property under the provisions of § 91 of the Code of Civil Procedure, which notice has been extended several times, the last time being November 16, 1960.

From the record before the Court it appears that on April 5, 1961, defendants filed a Motion Requesting that the Registrar of Property be Ordered to Cancel in Part the Notice of *Lis Pendens*. It referred to Elizabeth Tyrell Howard's share in the community property. It was dismissed on the 21st of the same month. Thereafter, on

June 23, defendants filed a Demurrer for Lack of Facts and Motion to Dismiss, addressed to the second and third causes of action. On July 14 the Court refused to pass upon said motions because of the stipulation between the parties not to litigate any other aspect of the case until the Court of Appeals disposed of the appeal taken thereto and because the aforesaid stipulation was not included in the record of the case before the Court.

The incident now submitted to our consideration began with a Motion for the Cancellation of a Notice of *Lis Pendens* filed by defendants on July 24, 1961. That motion is predicated on defendants' contention that, since it is clear from the face of the allegations that plaintiff is not entitled to inherit from the properties of Rafael Sauri Tristani, it must be concluded that she has no right to a notice of *lis pendens* in her favor in connection with said properties.

On August 18, 1961, the parties agreed to submit the question by brief and they were given thirty days therefor. They have done so.

A jurisdictional question raised by plaintiff must be decided first. In brief, plaintiff alleges that, inasmuch as defendants appealed from the judgment rendered in this case by our Honorable Supreme Court, this Court is barred from taking cognizance of and deciding collateral questions affecting or limiting any possible scope, application, results, juridical efficacy, or value in law of the decision appealed from.

Jurisdictional questions are privileged and should be decided with preference and when the court lacks jurisdiction it is its duty to so declare, without further consideration. *Ponce v. F. Badrena e Hijos, Inc.*, 74 PRR 210, 231; *P. R. Housing Authority v. Sagastivelza*, 71 PRR 406, 409. Plaintiff's position is untenable. The question now raised did not come before the Court when it decided the first

cause of action, and thereafter there has been no pronouncement at all with respect thereto.

It cannot be ignored that to date the only issue decided by this Court and by our Honorable Supreme Court is the action of filiation. As in *Morales* v. *Cruz*, 36 PRR 216, 218, which case is quite similar to this, it is now prayed that the Court enter an order after judgment touched upon matters not specifically passed upon therein. An aggrieved party is entitled to appeal from the order which may be entered. The situation would be different if the issue had been litigated and judgment had been rendered. Then, according to that case, the notice of *lis pendens* must remain in effect until there is no possibility of a judgment in favor of plaintiff, that is, until the Court of Appeals has entered judgment, and, likewise, the Honorable Supreme Court of the United States, should any party resort thereto. Thus, since the question raised is a collateral question not disposed of by judgment, we understand that the Court has jurisdiction to pass upon it.

We think it is proper at this time, for the sake of clarity and conciseness in our determination, to establish certain principles regarding which there should be no controversy. These are: (1) The Civil Code provides that there are two kinds of succession, testamentary and intestate, each of which is governed by different sections, 31 L.P.R.A. §§ 2251-2416, 31 L.P.R.A. §§ 2591-2626; *Sanchez* v. *District Court*, 69 PRR 457. (2) Acknowledged natural children are heirs. *Mendez* v. *Martinez*, 26 PRR 87, 91; *Ex parte Boerman* v. *Marrero*, 34 PRR 120. (3) An acknowledged natural child inherits by right of representation from his natural grand father in the intestate succession. *Gijon* v. *Sarillo et al.*, 31 PRR 191; *Ex parte Smith*, 14 PRR 643. (4) Such right of representation did not exist in testamentary successions prior to May 14, 1947. *Ex Parte Perez*, 53 PRR 20; *Torres*,

v. *Torres*, No. 9515, decided December 19, 1947 by the Hon. Angel R. de Jesús.

On May 14, 1947, our Legislature enacted Acts Nos. 446 and 447 amending §§ 736 and 887 of our Civil Code. Prior to the amendment, those sections read:

> "Forced heirs are: (1) Legitimate children and descendants; (2) In the absence of the foregoing, the legitimate parents and ascendants, with regard to their legitimate children and descendants; (3) The widower or widow, legally recognized natural children and their parents, in the manner and extent established in sections 761, 762, 763, 764, 767, 768, 769, 770, 771 and 772 of this Code."
>
> "The right which all the relatives of a person have to succeed him in all the rights which he would have if alive, or which he might have inherited, is called the right of representation." Section 887.

After the amendments, they read:

> "Forced heirs are: (1) Legitimate children and descendants, with regard to their legitimate parents and ascendants, and legally recognized natural children, with regard to their natural or legitimate parents and ascendants. (2) In the absence of the foregoing, the legitimate parents and ascendants, with regard to their legitimate children and descendants. (3) The widower or widow, in the manner and extent established in secs. 2411, 2412, 2413, and 2414 of this Title." (Section 736 of the Civil Code.)
>
> "The right which all the legitimate or legally recognized natural relatives of a person have to succeed him in all the rights which he would have if alive,

or which he might have inherited, is called the right of representation." Sec. 887 of the Civil Code.

Ex Parte Perez was decided on April 8, 1938. At that time our Honorable Supreme Court held that the Civil Code, as amended, contained nothing indicating the legislative intent to modify the law that had governed the rights of acknowledged natural children to represent their parents in such a way that they could inherit from the legitimate ascendants of such parents other than in the intestate succession. We copy from page 26 of the opinion:

> "We need not decide definitely in this case which is the succession to be preferred. The Legislature says nothing about this. Various acts have been passed by our Legislature improving the condition of natural children, but otherwise the Legislature has shown no intention of changing the existing 'family law' to which one or more of the appellants makes reference. We find nothing in the Civil Code, as reformed by the Legislature, to indicate that the latter intended to change the law which has regulated the rights of natural children to represent their parents, so as to inherit from the legitimate ascendants of those parents, other than as specified in the intestate succession."

When on December 19, 1947, in *Torres* v. *Torres*, *supra*, our Honorable Supreme Court had the opportunity to pass once more upon the question, and inasmuch as Acts Nos. 446 and 447 of that year were already in force, it was careful to note that "Acts Nos. 446 and 447 of May 14, 1947 are [not] applicable to this case, inasmuch as they went into effect after the death of Mercedes Laborde." The inference is clear. The result would have been different had the cause of action arisen after the effectiveness of those

acts. We have no doubt, and that is how we interpret the words of the Hon. Angel R. de Jesús, that in enacting Acts Nos. 446 and 447 it was the legislative intent to extend the right of representation of an acknowledged natural child in the testamentary succession in order to prevent any difference between both successions. Therefore, the scope of the doctrine of *Ex Parte Torres* has been limited.

We have seen that plaintiff was not entitled to inherit pursuant to the legislation in force in 1928, when she was born, nor in 1938, when her alleged father died, because at that time an acknowledged natural child could not inherit by right of representation in the testamentary succession of its natural grandfather. However, plaintiff claims that Rafael Sauri Tristani died when Acts Nos. 446 and 447 of May 14, 1947, were in force and that, therefore, she is entitled to inherit. She claims that her right to inherit is governed by the law in force at the time of the death of the predecessor.

Citing *Lucero et al. v. Heirs of Vila*, 17 PRR 141; *Correa et al. v. Correa, et al.*, 18 PRR 115; *Torres et al. v. Rubiaves et al.*, 20 PRR 316, and *Esteras v. Esteras et al.*, 24 PRR 413, our Honorable Supreme Court said in *Cancel v. Martínez* 74 PRR 100, 106, that "hereditary rights are regulated by the legislation in force at the time the predecessor dies." The *Esteras* case, citing the case of *Lucero*, holds that the law in force at the *time of the birth of the child* must be invoked to determine the right of the child to inherit from his father. But in *Gijon v. Surillo et al.*, 31 PRR 191, 195, the rule of the *Esteras* case was limited and, citing *Ex Parte Smith et al.*, 14 PRR 643, it held that the hereditary rights of a grandchild to inherit by right of representation from his paternal grandfather, are governed by the laws in force at the time of the death of his grandfather whose estate is to be distributed and not by the laws in force at the death of the father. *Ex Parte*

Smith et al. was decided in 1908 and it involved *an intestate succession*. The opinion accepts the decision of Judge Aldrey of the trial court in 1907 resting on the sixth provision of the temporary provisions of the Civil Code which copied verbatim reads:

> "The rights to the inheritance of him who has died with or without a will before this revised Civil Code goes into effect shall be governed by the previous legislation; the inheritance of those dying afterwards with or without a will shall be settled and partitioned in accordance with this revised Civil Code, but carrying out testamentary provisions in so far as this Code permits. There shall be respected to that extent the legitimate portions, advantages or extra portions and legacies, but reducing their amount, if there cannot be given in any other manner to each participant the share that belongs to him according to this revised Civil Code."

In this aspect the opinion in the *Esteras* case is in agreement with the well-established doctrine that actions of filiation are governed by the law in force at the time of the birth of the child. *Sanchez* v. *Diaz*, 78 P.R.R. 771; *De Jesus* v. *Abbott*, 77 PRR 488; *Mercado* v. *Heirs of Manigual*, 35 PRR 388; *Nunez* v. *Escot*, 32 PRR 76. That doctrine has a certain amount of logic considering that "inheritance is a consequence of filiation." *Marquez* v. *Aviles*, 79 PRR 816, 817.

In our opinion, *Cabred* v. *Martinez*, *supra*, has been recently set aside by our Honorable Supreme Court in *Marquez* v. *Aviles*, above referred to. Our highest Court has recognized that there is an inescapable distinction, to wit, that the status of the child, i. e., "he who inherits" is de-

termined by the law at the time of the birth, and the hereditary portion, i. e., "what he inherits", is determined by the law at the time of the death of the predecessor. The doctrine of *Esteras* v. *Esteras*, *supra*, springs up again and comes back to life.

It is well to note here that *Marquez* v. *Aviles* was affirmed by the United States Court of Appeals for the First Circuit by the judgment of February 25, 1958. Construing § 687 of our Civil Code, the Court, through the Hon. Calvert Magruder, states:

> "We mention briefly one point raised by appellants which the Supreme Court of Puerto Rico evidently did not consider of sufficient merit to comment upon. Appellants refer to the provision of § 687 of the Civil Code of Puerto Rico reading: 'In order to determine the qualification of the heir or legatee, the time of the death of the person whose succession is in question shall be taken into consideration.' They then point out that Bonifacio Aviles Perez did not die until 1954. But it is quite apparent from an inspection of the text, especially the second paragraph of § 687, that that section refers only to the preceding § 685, which prescribes the cases in which a person, admittedly an heir, may be disqualified from taking property by inheritance. As to the circumstances under which an illegitimate child may by recognition acquire the status of an heir, we have to look to the earlier sections of the Code."

In harmony with these principles we hold that Mercedes Berdecia is not entitled to inherit from the estate of Rafael Sauri Tristani. Inasmuch as she has no right to the inheritance, there is no possibility of a judgment in her favor

in that sense and, therefore, a notice of *lis pendens* in her favor does not lie in this case.

The motion for the cancellation of the notice of *lis pendens* is granted and the corresponding Registrar of Property is hereby ordered to cancel the notice of *lis pendens* in connection with each and every one of the properties involved in the notice in question.

Let this Order be notified.

Ponce, Puerto Rico, March 12, 1962.

(s) Antonio J. Matta
Superior Judge

I Certify: That the foregoing Order is a true and faithful copy of the copy received by me of the Order entered by Judge Antonio J. Matta, of the Superior Court of Puerto Rico, Ponce Part.

Ponce, Puerto Rico, March 18, 1962.

(s) Hector Lugo Bougal

Appendix "B"

IN THE SUPREME COURT OF PUERTO RICO

C-62-21

MERCEDES BERDECIA,
PETITIONER
v.
SUPERIOR COURT OF PUERTO RICO, PONCE PART,
HON. ANTONIO J. MATTA, JUDGE,
DEFENDANT
ISABEL CARMEN SAURI TYRELL ET AL.,
INTERVENERS

CERTIORARI

Division composed by MR. CHIEF JUSTICE NEGRON FERNANDEZ, MR. JUSTICE BLANCO LUGO and MR. JUSTICE RAMIREZ BAGES

Opinion of the Court delivered by MR. JUSTICE BLANCO LUGO
San Juan, Puerto Rico, January 25, 1963

In her uninterrupted judicial wandering to obtain full recognition of her rights as Felix Sauri Tyrell's child, once again Mercedes Sauri, nee Berdecia, appears before this Court requesting that we review an order entered by the Superior Court, Ponce Part, the practical effect of which is to deprive her of the hereditary rights inherent in her status as an acknowledged natural child.

The background of this case is set forth in the opinion delivered in *Berdecia v. Tyrell*, 82 P.R.R. ——— (1961). It need only be recalled that petitioner was born on October 3, 1928, as a result of an affair between Dolores Berdecia and Felix Sauri Tyrell; that the latter died intestate on December 3, 1938; and that on August 18, 1952, began the action of filiation which ended in recognition by our judg-

ment of May 23, 1961, summarily affirmed by an order entered on June 21, 1962, by the Court of Appeals for the First Circuit in *Tyrell v. Berdecia*, No. 6016.

In addition to the action of filiation, the original complaint alleged two causes of action regarding the annulment of the institution of heirs contained in the will of Rafael Sauri Tristani—Felix Sauri Tyrell's father and, consequently, plaintiff's natural grandfather—and for the declaration of the non-existence of contracts, whose decision was postponed by the parties by means of a written stipulation to that effect pending final disposition of the main action of acknowledgment, inasmuch as petitioner's capacity to file said actions rested on the fundamental fact of her status as an acknowledged natural child. Plaintiff had the complaint recorded next to the description of certain real properties included in the estate left at the death of her natural grandfather, pursuant to § 91 of the Code of Civil Procedure, 1937 ed., 32 LPRA § 455.[1] *Olivera v. Registrar*, 51 PRR 399 (1937); *Boerman v. Registrar of San Juan*, 31 PRR 695 (1923).

While the appeal taken to the Court of Appeals for the First Circuit was still pending, and notwithstanding that the parties had stipulated not to take any action in connection with the second and the third causes of action until final judgment was entered as to the filiation, on July 24, 1961 defendants moved for the cancellation of the notices of *lis pendens* recorded as above stated. The motion rested on the allegation that plaintiff had no cause of action to challenge the institution of heirs contained in her natural grandfather's will because she was not a forced heir of the latter, and called attention to the doctrine established by this Supreme Court in *Ex Parte Perez*, 53 PRR 20

[1] Section 91 of the Code of Civil Procedure was not repealed upon the enactment of the Rules of Civil Procedure of 1958, Rule 72.

(1938). Through this motion—which is unusual—was the sufficiency of the complaint thus challenged.

To have a full picture of the facts that must be known in order to render a decision, it must be recalled that Mr. Sauri Tristani died on January 25, 1952, under an open will executed on January 26, 1949, in which he instituted as his only heirs his legitimate child Isabel as to the thirds of strict legal portion and of extra portion, and his legitimate grandchildren Isabel Maria and Eugene Lois Nicole Sauri, the children of the above-mentioned Isabel, in the third of free disposal. It should be noted that when the last will was executed, his son Felix had predeceased him, and his natural grandchild Mercedes, not only had not been acknowledged, but, also, had not yet filed her second action that finally resulted in recognition.[2]

In an elaborate order dated March 12, 1962, the trial court granted defendants' request holding that plaintiff "is not entitled to inherit in connection with the estate of Rafael Sauri Tristani." Its conclusions may be summarized as follows: (a) petitioner was not entitled to inherit under the legislation in force on the date of her birth (1928) and on the date of her natural father's death (1938), because pursuant to *Ex Parte Perez*, 53 PRR 20 (1938), a natural grandchild had no right to inherit by right of representation in the *testamentary* succession of his natural grandfather; (b) Acts Nos. 446 and 447 of May 14, 1947, amending §§ 887 and 736 of the Civil Code, 1930 ed., 31 L.P.R.A. §§ 2621 and 2362 and which, as the trial court itself acknowledges, had the effect of "extending the right of representation of a recognized natural child in the testamentary succession in order that there might be no differ-

[2] Plaintiff filed an action of filiation during the lifetime of her alleged father, which ended by a judgment entered on November 30, 1938, dismissing the case for abandonment. See footnote 5 of the opinion delivered in *Berdecia v. Tyrell*, 82 PRR _____ (1961).

ence between both successions," are not applicable in determining petitioner's right to inherit, for such right is governed by the legislation in force at the time of her *birth* and not by the provisions in force at the time of the death of the predecessor or testator. In support of this last allegation it is claimed that the doctrine ratified in *Cancel v. Martinez*, 74 PRR 100 (1952)—"hereditary rights are regulated by the legislation in force at the time the predecessor dies"—was set aside in *Marquez v. Aviles*, 79 PRR 817 (1957).

1. Both the legislation in force at the time of petitioner's birth—1928—and at the time her natural father died—1938—and at the time of her natural grandfather's death—1952—determined, among the rights of recognized natural children, the right "to receive the hereditary portion determined in this Code." Section 105 of the Civil Code, 1902 ed., as amended by Act of March 9, 1911 (Laws, p. 234), 1911 Revised Statutes, sec. 3265; 127 of the Civil Code, 1930 ed., 31 L.P.R.A. 506. Undoubtedly, therefore, once acknowledgment was obtained, a natural child was entitled *to inherit*, but only as to the hereditary portion determined in the very code.

Insofar as the right of representation is concerned, we must distinguish two periods: (1) until May 14, 1947, the date of approval of Acts Nos. 446 and 447, *supra*, an acknowledged natural grandchild could inherit by right of representation from his natural grandfather in the *intestate succession*, *Ex Parte Smith et al.*, 14 PRR 643 (1908); *Gijon v. Surillo, et al.*, 31 PRR 191 (1922); but such was not the case in the testamentary successions, *Ex Parte Perez*, 53 PRR 20 (1938), ratified in the unpublished opinion delivered by the deceased Mr. Justice de Jesus in *Torres v. Torres*, decided December 19, 1947; see, Munoz Morales, *Anotaciones al Codigo Civil de Puerto Rico, Libro Tercero* (1939), pp. 327-28; (2) beginning on May 14, 1947, and by

virtue of the amendments of §§ 887[3] and 736[4] of the Civil Code, a natural grandchild inherits by right of representation from his natural grandfather, both in the intestate succession (see, *Silva* v. *John Doe*, 75 PRR 198, 204 (footnote 7) (1953)), and in the testamentary succession, thereby identifying himself with the natural and the legitimate family. This is so because § 736 specifically determined that "Forced heirs are [those whom the testator can not deprive of their legal portion]: 1. Legitimate children and descendants, with regard to their legitimate parents and ascendants, and *legally recognized natural children*, with regard to their natural or legitimate parents and ascendants."[5]

2. Once these alleged preliminaries are laid down, the problem raised in this case is merely to determine whether Mercedes Sauri Berdecia's hereditary rights in the *testamentary inheritance* of her natural grandfather are governed by the law in force at the time of her birth, at the time her natural father died, or at the time of her natural grandfather's death.

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[3] "The right which all the *legitimate or legally-recognized natural* relatives of a person have to succeed him in all the rights which he would have, if alive, or which he might have inherited, is called the right of representation."

[4] "Forced heirs are: 1. Legitimate children and descendants, with regard to their legitimate parents and ascendants, *and legally recognized natural children*, with regard to their *natural or legitimate* parents and ascendants. 2. . . ."

[5] Because we consider it of a great interest, we attach hereto as Appendix A a copy of the opinion delivered by Mr. Justice de Jesus in *Torres* v. *Torres*. We call attention to the clear inference derived from footnote 1 regarding the effect of Acts 446 and 447 in connection with the right of representation in the natural family, and which the trial judge correctly states thus: "We do not doubt, and that is our construction of the words of the Honorable Angel R. de Jesus, that it was the legislative intention, in enacting Acts 446 and 447 . . . to extend the right of representation to the testamentary succession in order that there would be no difference between both successions."

Ex Parte Perez, 53 PRR 20 (1938) holds, quoting from the syllabus, "as the testatrix died in 1934, her natural grandson, that is, a natural child of her legitimate son, has no right, according to the law in force at that time, to succeed her in representation of his natural father." And in *Torres* v. *Torres*, *supra*, which also involved the succession of a testatrix who had died in 1945, it was held, in the only footnote of the opinion, that: "The law determining hereditary rights is not the law in force at the time *the alleged person being represented* [the natural father], but the law in force when the predecessor [the natural grandmother] died."[6] In *Ex Parte Smith et al.*, 14 PRR 643 (1908), which involved an intestate inheritance, it was likewise held that the hereditary rights of a grandchild to inherit by right of representation from his paternal grandfather, are governed by the laws in force at the time of the death of his grandfather, *whose estate is to be distributed and not by the laws in force at the death of the father*. The holding in *Correa* v. *Correa*, 18 PRR 115, 118 (1912) is to the same effect. Finally, *Gijon* v. *Surillo, et al.*, 31 PRR 191 (1922) clearly establishes that an acknowledged natural child has the right to inherit from the lawful father of his natural mother as her representative, and that said right must be determined in accordance with the law in force at the time of the death of the author of the estate and not in accordance with that in force when the child was born.

These holdings are but a specific application of the doctrine invariably followed and strictly ratified in the sense that the hereditary rights are governed by the laws

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[6] In the *Torres* case the legitimate children of the testatrix successfully challenged the testamentary institution made by the natural grandmother in the third of the portion by force of law and in the third of extra portion in favor of a natural grandchild, the acknowledged natural child of a predeceased legitimate child. The natural grandchild unsuccessfully invoked the right of representation in support of the validity of the testamentary provision.

in force at the time of the death of the predecessor or testator and which we have uniformly applied in *Lucena et al. v. Heirs of Vila*, 17 PRR 141 (1911); *Torres et al. v. Rubianes et als.* 20 PRR 316 (1914); *Velazquez v. De Choudens et als.* 29 PRR 481, 483 (1921); *Febre et al. v. Febre*, 40 PRR 208 (1929); *Travieso v. Del Toro*, 74 PRR 940 (1953);[7] *Cancel v. Martinez*, 74 PRR 100 (1952); *Ab Intestato of Ana Garroti Padilla*, 79 PRR 181 (1956); *Heirs of Rosario v. Rosario*, 84 PRR ____ (decided on April 5, 1962).[8] Even if we construed the case of *Estéras v. Esteras*, 24 PRR 413 (1916) as suggested by the trial court—one must turn to the legislation in force at the time of the child's birth to determine whatever rights he may have in the inheritance of his father—we would always obtain the same result, for the legislation in force in 1928, when Mercedes Sauri Berdecia was born, recognized her *right to inherit* the hereditary portion determined by the Code and, we add, since this portion may be established by the law in force at the time of the death of the person whose succession is involved. The *Esteras* case involved the "acknowledgement" of an adulterous child who, under the legislation in force at the time of his birth, was only entitled to support. *Cf. Rossa v. Martinez*, 70 PRR 703 (1949). *Marquez v. Arriles*, 79 PRR 817 (1957), aff. 252 F.2d 715 (1958), did not operate to "discard" the doctrine of *Cancel v. Martinez, supra*, and the numerous cases above cited. That case involved certain adulterous children pursuant to

[7] We said at p. 944: "The applicable law as to the juridical effectiveness of a will and as to the *content*, scope and extent of the hereditary rights of the alleged successors is that which prevailed when the *ancestor died*, and not the one prevailing when the will was executed."

[8] A corollary of this doctrine is the principle that "the substantive rights involved in an hereditary partition are determined and governed by the laws which prevail at the time of the predecessor's death," and not those in force when the partition takes place. *Cortes v. Cortes*, 84 PRR ____ (decided September 28, 1962).

the law in force at the time of their birth. As such they were entitled only to support, but by virtue of § 2 of Act No. 229 of May 12, 1942, as amended, 31 L.P.R.A. § 502, it was provided that said children shall be considered as natural children for the sole additional purpose of bearing the surname of their parents. Clearly, recognition with limited effects did not entitle them to inherit. *Cf. Ex Parte Vélez*, 81 PRR 634 (1960); *Alvarez v. Alvarez*, 77 PRR 862 (1955); *Sanchez v. Diaz*, 78 PRR 771 (1955); *Cortes v. Cortes*, 73 PRR 643 (1952). In the instant case, petitioner, as the acknowledged natural child of unmarried parents, had the right to inherit, both under the law in force at the time of her birth and under the law in force at the time of her natural father's death, at the time of the execution of the will of her natural grandfather, and at the time of the latter's death; and that was one of the juridical consequences of her filiation.

The order entered by the Superior Court, Ponce Part, on May 12, 1962, shall be set aside, and the case shall be remanded for further proceedings not inconsistent with this opinion.[9]

(s) Luis Blanco Lugo
Associate Justice

(Same Title)

Division composed by Mr. Chief Justice Negrón Fernández, Mr. Justice Blanco Lugo and Mr. Justice Ramírez Bages

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JUDGMENT

San Juan, Puerto Rico, January 25, 1963

For the reasons stated in the foregoing opinion, the order entered by the Superior Court, Ponce Part, on March 1

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[9] This litigation has been going on for ten years, and it is to the best interest of all parties concerned that it be definitively decided as soon as possible.

12, 1962, is hereby set aside, and the case is remanded for further proceedings not inconsistent with said opinion.

It was thus decreed and ordered by the Court as witnesses the signature of the Chief Justice.

(s) Luis Negrón Fernández
Chief Justice

I attest:

(s) Ignacio Rivera
Secretary

APPENDIX A

In the Supreme Court of Puerto Rico

No. 9515

Gabriel Torres Laborde *et al.*,
PLAINTIFFS AND APPELLEES,

v.

Ramon Torres Olivencia, a minor, etc.,
DEFENDANT AND APPELLANT

APPEAL FROM THE DISTRICT COURT OF SAN JUAN

DECLARATORY JUDGMENT

Opinion of the Court delivered by Mr. Justice de Jesús

San Juan, Puerto Rico, December 19, 1947

Mercedes Laborde died in Ponce on March 14, 1945, under a will executed on May 12, 1941. She stated in her will that she was the widow of Marcelino Torrés, whom she had married for the first time and only time; that during her marriage she had the following children: Mercede, Carlos, Gabriel, Ramon, Isabel Luz, Concepcion, and Rafael; and that Ramon died leaving as his sole and universal heir his acknowledged natural child Ramon Torres Olivencia. She went on to say that she instituted as her sole and universal heirs, with respect to the third of the

portion by force of law in equal shares, her above-mentioned children and that inasmuch as her son Ramon had died, she instituted Ramon Torres Olivencia in his representation as heir of his portion in the third by force of law. She also left her aforesaid grandchild the entire third of extra portion and the third of free disposal.

The heirs Gabriel, Luz Isabel, and Rafael hold that the will is null insofar as it instituted Ramon Torres Olivencia an heir in the third by force of law and the third of extra portion and insofar as it holds that he has the right of representation as Ramon Torres Laborde's natural child.

In order to obtain a judicial interpretation of the testamentary provisions above mentioned, Gabriel, Luz Isabel, and Rafael filed this action for declaratory judgment in the trial court.

Defendant filed a motion to dismiss the complaint on the ground that it did not state facts constituting a cause of action. The motion was dismissed and, there being no controversy as to the facts and wishing to rely on the merits of the motion to dismiss, defendant prayed for judgment on the pleadings, which judgment was entered granting the complaint. Defendant relies on the right of representation to support the validity of the testamentary provision.

The question raised by defendant was adversely decided in *Ex Parte Perez*, 53 PRR 20. In that case the testatrix, the natural grandmother of petitioners therein, died on June 28, 1934, under a will executed on June 20, 1921. She instituted as her sole and universal heirs her legitimate children Jose, Fernando, and Isabel Perez Llera, and Carmen Luisa Rucabado Llera, the first three being the offspring of her first marriage with Fernando Perez, and the last-named child her daughter of her second marriage with Mateo Rucabado. The heir Jose Perez Llera, the natural father of petitioners therein, predeceased the testa-

trix by two years, leaving as his sole heirs the petitioners and their grandmother, Isabel Llera Vazquez. When the latter died, petitioners requested that a partitioner be named with respect to the inheritance left by Isabel Llera Vazquez. They alleged that they were her heirs in representation of their natural father Jose Perez Llera and that, consequently, they were entitled to intervene in the partition of the inheritance.

The executor objected alleging by way of a demurrer that the petition did not state facts and that petitioners had no right to intervene in the partition as they were neither heirs nor had any right in the inheritance of their natural grandmother.

Considering the question thus raised, which is the same, in principle, as the question raised by defendant herein, after analyzing the legal precepts applicable to the law and the decisions construing such precepts, this Court held that inasmuch as the grandmother had died under a will and petitioners were recognized natural children, they neither had a right to the inheritance by representation of their father, nor were they forced heirs of their grandmother.

In the opinion delivered in that case the questions raised in this case are examined, and since its doctrine is not challenged and there being no reasons to disturb it here, we must follow that doctrine and, consequently, we must affirm the judgment appealed from.

(s) A. R. DE JESUS
Associate Justice

The law determining hereditary rights is not the law in force at the time the alleged heir died, but the law in force when his predecessor died. *Ex Parte Perez, supra. Corrujo v. Corrujo*, 18 PRR 115, and *Ex Parte Swann et al.*, 14 PRR 643. Consequently, neither Act No. 13, approved March 29, 1945 (p. 38), nor Acts Nos. 446 and 447 of May 14, 1947 (p. 944), are applicable to this case, inasmuch as they went into effect after the death of Mercedes Laborde.

Office Supreme Court, U.S.
FILED
JAN 15 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 219

ISABEL CARMEN SAURI-TYRELL, ET AL., *Petitioners*

v.

MERCEDES BERDECIA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

CARLOS D. VAZQUEZ,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 219

ISABEL CARMEN SAURI-TYRELL, ET AL., *Petitioners*

v.

MERCEDES BERRECIA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come the petitioners and through their undersigned counsel respectfully pray this Honorable Court to reconsider its order of October 21, 1963 denying certiorari for the following reasons which were available to petitioners though not previously stated to this Court.

The petitioners respectfully urge that their constitutional rights have been denied as a result of an erroneous appli-

cation of laws by the lower courts in this case contrary to the doctrines jurisprudentially established by the Supreme Court of the Commonwealth of Puerto Rico, and by Organic Acts, Laws of Congress, Military Orders in force, all duly sustained and affirmed by the Supreme Court of Puerto Rico.

In order to make a clear and definite statement of the violation of said Laws of Congress that grant such rights that only could be classified as constitutional, we must begin with stating the origin of such rights to the citizens of Puerto Rico.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a Treaty of Peace between the United States of America and Her Majesty the Queen Regent of Spain, in the name of her August Son, Don Alfonso XIII, was concluded and signed by their respective plenipotentiaries at Paris on the tenth day of December, 1898, the original of which Convention being in the English and Spanish languages, is word for word as follows:

The United States of America and Her Majesty the Queen Regent of Spain, in the Name of her August Son, Don Alfonso XIII, desiring to end the state of war, now existing between the two countries, have for the purpose appointed as Plenipotentiaries:

The President of the United States,

William R. Day, Cushman K. Davis, William P. Frye, George Gray, and Whitelaw Reid, citizens of the United States and for Her Majesty the Queen Regent of Spain, Don Eugenio Montero Rios, President of the Senate. . . .

Who, having assembled in Paris, and having exchanged their full powers, which were found to be in due and proper form, have after discussion of the matters before them, agreed upon the following articles:

ARTICLE I

Spain relinquishes all claim of sovereignty . . .

ARTICLE II

Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

ARTICLE III

In faith whereof, we, the respective Plenipotentiaries have signed this treaty and have hereunto affixed our seals.

Done in duplicate at Paris . . . Signature of Plenipotentiaries following and closing the treaty . . .

And whereas, the said Convention has been duly ratified on both parts, and the ratification of the two Governments were exchanged in the City of Washington, on the eleventh day of April, one thousand eight hundred and ninety nine.

Now, thereof, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this eleventh day of April, in the year of Our Lord one thousand eight hundred and ninety nine, and of the Independence of the United States the one hundred and twenty-third.

WILLIAM MCKINLEY

By the President

JOHN HAY
Secretary of State

From Treaty of Paris, I.P.R.A. Titles 14, pages 15, 16, and 21.

On April 12, 1900 the Congress of the United States, approved and enacted the Organic Act, or Foraker Law, c. 191 post 1, 31 Stat. 77, the first constitution for Puerto Rico, entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes." Section 1 thereof provided the provisions of this Act shall apply to the Island of Puerto Rico and to the adjacent island and waters of the islands.

Section 8 thereof provides:

> "The laws and ordinances of Puerto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions thereof, amended or repealed by the legislative authority hereinafter provided for Puerto Rico or by Act of Congress of the United States."

L.P.R.A. Titles 1-4, posts 1 and 8, Organic Act, pages 23, 28, and 29, to the effect that Civil Code and the Mortgage Laws and its Regulation, were left in force by said law of Congress.

Provisions continued in force:

> "The Civil Code was continued in force by this section." *Olivieri* v. *Biaggi*, 1911, 17 P.R.R. 675

> "The Mortgage Law and its Regulations were continued in force by this section." *Gimenez* v. *Brenes*, 1906, 10 P.R.R. 124; *Muñoz* v. *District Court*, 1931, 42 P.R.R. 371.

> "Under this section, the General Orders were continued in effect." *Chevremont* v. *People of Puerto Rico*, P.R.R. 108.

> "No one of the provisions of the Mortgage Law can be repealed by implication, but must be repealed by special law, according to the provisions of this

> section, which, under section 8 of the Organic Act of 1900, declared the aforesaid law continued in force." *Gimenez v. Brenes, supra.*

The 2nd Organic Act of Puerto Rico, of March 2, 1917, c. 145, 39 Stat. 951, known as Jones Act, and entitled "An Act to provide a civil government for Puerto Rico, and for other purposes" provided in Section 1, corresponding to Section 1, of Organic Act of 1900, for its jurisdiction over Puerto Rico and adjacent islands and Section 57 corresponding to the continuance of Laws, Ordinances of Puerto Rico, as in Section 8 of the Organic Act of 1900. Finally, there was Public Law 600, 81st Congress; An Act to provide for the organization of a constitutional government by the people of Puerto Rico. Article IX, 1, corresponding to Section 8, Organic Act 1900, Section 57 Organic Act 1917, stating said Article IX, 1, (Laws, rights, liabilities, etc. continued) "When this Constitution goes into effect all laws not inconsistent therewith shall continue in full force until amended or repealed, or until they expire by their own terms." This Public Law 600 of Congress was approved by Public Law 447, 82d Congress; Joint Resolution approviding Constitution of the Commonwealth of Puerto Rico on July 3, 1952.

Civil Code of Puerto Rico, Sect. 5, Title 31, page 334 provides:

> "Repeal of Laws—Laws shall only be repealed by means of subsequent laws; and disuse, custom or practice to the contrary shall not impede their enforcement". . .

Title 30, post 777, page 902 (Article 413 Mortgage Law, in force since 1893):

> "All previous provisions regarding mortgages are hereby repealed, all other provisions in conflict with those of this subtitle are also hereby repealed. None of these sections of which this subtitle consists can be

repealed except by virtue of another special law and no budget law shall ever be considered a special law for this purpose".

"The period fixed in this subtitle shall be computed from the date on which it goes into effect." Mortgage Law, 1893, Art. 413.

JURISPRUDENCE AFFIRMING ABOVE PROVISION

"None of the provisions of the Mortgage Law can be repealed by implication, but must be repealed by special law, according to the provisions of this section, sanctioned by the Congress of the United States, which, under section 8 of the Organic Act of 1900, declared that the aforesaid law continued in force". *Brenes* v. *Gimenez*, 10 P.R.R. p. 124.

The question involved in this case which has not been previously raised is whether it can be held by a court that notation of *lis pendens* be taken and entered at the Registrar of Property, by a proceeding contrary to the dispositions of Article 42, 1, Mortgage Law, in its Regulation being Article 91, by means awarded in Section 91 of the Code of Civil Procedure, Ed. 1933 L.P.R.A. Title 32, post. 455, Chapter 59, page 757.

The Mortgage Law, Article 42, 1—Post 91, Title 30, page 699, prescribes:

PERSONS ENTITLED TO CAUTIONARY NOTICES

"The following may request the entry of cautionary notices of their respective rights in the proper public registry"

1—He who brings an action to recover the ownership of real property or the constitution, declaration, modification or extinction of any real right."

2—. . .

Corresponding in Mortgage Regulations, Post 971 Title 30-31, L.P.R.A. page 52, Art. 91.

ACTION TO RECOVER OWNERSHIP OR TO CREATE OR ESTABLISH PROPERTY RIGHTS

"The person who brings the action of ownership referred to in the first subdivision of section 91 of this title, may at the same time or later apply for a cautionary notice thereof, *offering to make indemnity for any damages* which defendant may suffer thereby if he should win the suit."

"The judge of the Court shall order the cautionary notice entered, if proper at the time of admitting the complaint; and if application should be made thereof subsequently within a term of three days." (Mortgage Reg. 1893, Art. 91)

Facing this above Congressional sanctioned proceeding, Article 91, Code of Civil Procedure, Ed. 1933, L.P.R.A. Title 32, chapter 59, page 777, provides and reads:

"In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file for record with the registrar of the district in which the property or some part thereof is situated, a notice of the pendency of the action or defense and a description of the property affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency (of the action, and only of its pendency) against parties designated by their real names."—Code of Civil Procedure, 1933, post 91.

Now, this Article 91, amends by implication to the prejudice of the property owner, with a duly recorded title, with all the requirements and exigencies of the Civil and Mortgage Law, that any non bona fide litigant can, without offering bond, warranty or indemnity for damages sustained by said cautionary notice to property owner with a vicious and unjustified complaint, entered such cautionary notice in the Registrar.

It is to the prejudice of the property owner because said Article 91 relieves the plaintiff from taking any heed in causing damages with a tortious proceeding against defendant property owner, while by the provisions of Mortgage Law and its Regulations, he is obliged thereof with said cautionary notice, "to offer to make indemnity for any damage which defendant may suffer thereby" in case that defendant should win the suit.

Said limitations, modifications and partially repealing of the Mortgage Law, Article 42-1 and its Regulation, Article 91, by Section 91 of the Code of Civil Procedure, is contrary to law and jurisprudence and is against the sanction of Congress to said Mortgage Law and its Regulation since April 12, 1900, Organic Act, Sec. 8; March 1917, Jones Act, Section 57, and Congress Law 600, Granting a Constitution to Puerto Rico, Article IX,-1, duly sustained this thesis by the Decisions to this effect stated *supra*.

Article 91 of the Code of Civil Procedure by its repealing implication relieves plaintiff from his fair, equitable and legal obligation to offer indemnity to the defendant if said complaint is not just. Allow us to call it a fishing expedition. Said unjustified relief is to the prejudice of one who having gone through all honest dealings in acquiring a property; having it recorded to his safety, in the Registrar according to law, has to undergo a claim with no hope of lifting such cautionary notice until the case comes to an end; deprived of his property without even having the means to be indemnified by a tortious litigant; having to stand and undergo the freezing of its property, deprived in its right to enjoy it freely and, perhaps, to yield to a bastardy to take out of his patrimony the wall of separation from the honest marketing possibility. It is clear that such proceedings cannot even by implication, repeal, modify, limit or in any way create rights against the provisions of Article 42-1 Mortgage Law and its Regulations, and violating this law, causing a proceeding contrary to the proceedings acknowledged by statute laws sanctioned

by the Congress of the United States, and said violation, and sentences granting such spurious rights can be and are the subject of a review under the jurisdiction of the Supreme Court of the United States, on behalf of public policy, as created by the enforcement of Congressional Laws and Decrees. There is no special law repealing the *lis pendens* proceedings acknowledged by the Mortgage Law; then any provision with a repealing character that is not a special law to the effect of repealing any of its provisions, is void, null and of no legal value, and ought not be followed in court issues by sentences or decrees of courts to its validity.

From American Jurisprudence, Vol. 34, Lis Pendens, Sect. 7, page 366:

> "Operation of Statutes.—Since the doctrine of lis pendens is a part of the common law, the authorities appear to agree that statutes, such as those noted in the preceding section, neither create nor abrogate it, but merely limit the operation to a certain extent."

and Sect. 6—page 366:

> "A statute requiring a formal notice of lis pendens to be recorded is not unconstitutional, since such requirement is regarded as being intended merely to provide a convenient and effectual method of enforcing the Common Law rule."

From Fourth Decennial Digest, American Digest System 1926 to 1936, Volume 6, p. 1480, Sect. 212 cites the case of C.C.A. Ark. 1928:

> "Property rights cannot be invaded by laws which, under guise of police regulations, have some ulterior purpose (Const. Amend. 14)—*Road Improvement Dist. No. 7 of Crittenden County, Ark. v. St. Louis-San Francisco R. Co.*, 28 F. 2d 825.
>
> "Enactments of Legislature under guise of police power will be set aside by courts when unwarranted

or arbitrary (Const. Amend. 14)—*Road Improvement Dist. No. 7 of Crittenden County, Ark.* v. *St. Louis-San Francisco R. Co.*, 28 F. 2d 825."

Petitioners tried to discuss this matter at the Ponce Part, Superior Court of Puerto Rico, through a motion of Demurrer for Lack of Facts, and Motion to Dismiss, addressed to the second and third causes of action, in this case docketed Civil No. TS-52-114, *Mercedes Berdecia, Plaintiff* v. *Elizabeth Tyrell Howard, et al., Defendant*, on file of said motion June 23, 1961, but that Honorable Court, Ponce Part, Superior Court of Puerto Rico, simply refused to pass upon it for the reasons stated in its resolution ordering cancellation of lis pendens, in behalf and favor of petitioners (see record, page 8), reversed by the Supreme Court of the Commonwealth of Puerto Rico. (The first cause of action is affiliation.)

The above decision in C.C.A. Ark. 1928, does clear up the situation by stating that unwarranted or arbitrarily, no law enactments can be taken or approved by legislation, as that it is the duty of courts to set aside legislation. Being constitutional, the repealing provisions of the Mortgage Law, in its peculiar way of being only repealable by special legislation to the effect, said repealing provision is binding, and its the duty of the court to sustain it and to set aside its repealing by merely implication.

Since petitioners' rights have been hindered in a way peculiarly inexplicable by the lower court's actions or resolutions, expressly contrary to law and policy in the appreciation of statutes, even Congressional Acts, and sanctioned legislation by Congressionad mandate and statutes of the Commonwealth of Puerto Rico, whose validity as such are in issue by the erroneous court decision, being such court orders and resolutions not only contrary to law, but of hindrance to the legal rights of petitioners, the seeking of relief at the doors of the Supreme Court of the United States is our belief that we have procedural and

substantive grounds to pray the Supreme Court of the United States to exercise its jurisdiction for relief and remedy to our cause.

CONCLUSION

The right to own property and to enjoy its possession is a constitutional right. The property owned by petitioners is secured to them by the above said Constitutions.

Both Federal and States Constitutions do preserve and protect and warrant such rights to property and its free enjoyment.

Owners of property, such as petitioners, by means of erroneous proceedings, orders, decrees or sentences cannot be deprived of these lawful and constitutional privileges and preogatives or by the interpretation of laws erroneously and contemptuous in their construction.

If deprivation comes on account of such laws or by their erroneous interpretation by courts, or freezing free enjoyment of such property, the Federal and State Constitutions are violated and Federal Laws to the effect are violated. The result of these violations are repugnant not only to the Federal and State Constitutions, but to the Federal and State Laws, and the progressive policy of fair play and good behavior of the citizens.

PRAYER

Wherefor, it is respectfully prayed that this Court reconsider its Order denying certiorari and that a writ of certiorari be issued to the Supreme Court of the Commonwealth of Puerto Rico in case No. C-62-21.

Respectfully submitted,

(S) Carlos D. Vazquez,
Counsel for Petitioners.
P.O. Box 1658
San Juan, Puerto Rico.

San Juan, Puerto Rico, January 16, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 219

ISABEL CARMEN SAURI TYRELL, ET AL., *Petitioners*,

v.

MERCEDES BERDECIA, *Respondent*.

Certificate

I, CARLOS D. VAZQUEZ, do hereby certify: That I am counsel for the petitioners in this case; that the petitions for review and for rehearing had been filed in this case, in good faith and without any purpose of delaying the proceedings.

San Juan, Puerto Rico, January 16, 1964.

s/ CARLOS D. VAZQUEZ
Carlos D. Vazquez
Counsel for Petitioners

I, Carlos D. Vazquez, counsel for the petitioners in this case, DO HEREBY CERTIFY;

That a true and faithful copy of this Certificate has been sent by mail to Mr. Hector Lugo Pagan, counsel for Mercedes Berdecia, to his known address: P. O. Box 205, Ponce, Puerto Rico.

San Juan, Puerto Rico, January 16, 1964.

s/ CARLOS D. VAZQUEZ
Carlos D. Vazquez
Counsel for Petitioners